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**Our ref: PFA/GA/5533/05/VIA**

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”) – W NKWAHATSI v MUNICIPAL EMPLOYEES PENSION FUND (formerly known as the TRANSVAAL JOINT MUNICIPAL ANNUITY AND GRATUITY FUND) (“the fund”) & MIDRAND LOCAL MUNICIPALITY (“the municipality)**

Introduction

- [1] This matter concerns the payment of a retirement benefit, in particular a monthly pension. The reformulated complaint was received by this office on 16 November 2005. On 1 December 2005 letters were dispatched to the municipality and the fund giving them until 22 December 2005 to file their respective responses to the complaint. A response was received from the municipality on 13 July 2006. A response was not received from the fund. On 3 August 2006 a copy of the municipality’s response was sent to you for a reply by 10 August 2006. A reply was received from you on 17 October 2006. After considering the written submissions before me, I find it unnecessary to hold a hearing in this matter. My determination and the reasons therefor follow.

The background facts and the complaint

- [2] You were employed by the municipality from 1982 until 1988 when you allegedly went on early retirement as a result of ill health. By virtue of your employment you joined the fund with effect from 1 February 1985.

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M Mohlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator)

Office Manager: L Manuel

- [3] You allege that you were not paid your “pension fund benefits” when you left the service of the municipality in 1988. You request that the municipality pay you a retirement benefit comprising of one-third cash lump sum and a monthly pension, retrospective from 1988.

#### The response

- [4] The municipality states that the fund informed it that no records as regards your membership could be found. A letter to that effect was attached to the municipality’s response.
- [5] According to the municipality, it does not retain personnel records for longer than 7 years. Thus, they do not have any information pertaining to your employment or membership of the fund.

#### Determination and reasons therefor

- [6] In terms of section 30I(1) of the Act this office may not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint was received.
- [7] Your complaint relates to the non-payment of a fund benefit which you allegedly became entitled to after you left the service of the municipality in 1988. The complaint was only received by this office on 16 November 2005, some 16 years after the act which gave rise to it. Therefore, in terms of section 30I(1) your complaint is time barred.
- [8] There is good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this. In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) the court said (at paragraph [11]):

“Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.”

- [9] However, that the complaint has become time-barred in terms of section 30I of the Act is not the end of the matter as I still have a discretion in terms of section 30I(3) of the Act to extend the three year time period, or to condone non-compliance with the three year period. In order for me to condone the non-compliance there must be good cause.

- [10] The Supreme Court of Appeal (or Appellate Division as it was then known) has pronounced upon the standard that must be met for condonation to be granted in circumstances like these. In *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) the court said (at 532B-E):

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked.”

- [11] In light of the factors that I have mentioned, I now proceed to determine whether good cause exists to condone your non-compliance with the time limits.
- [12] A delay of 16 years, for which no explanation is given, is unreasonably long. As a result of this inordinately long period that has lapsed the respondents were unable to extract any records pertaining to your employment and fund membership. Thus, the respondents were unable to submit a substantive response to your complaint. If I were to condone your non-compliance with the time-limits, it will cause severe prejudice to the respondents because they would not be in a position to submit a substantive response to your complaint.
- [13] Your attempts to resolve the matter or bring it to the respondents’ attention are also non-existent. There is no evidence in the papers before me of any action you have taken to proceed against the fund. I am aware of the fact that this tribunal was only established in 1996 and that the first Adjudicator only assumed office on 1 January 1998. Even though this tribunal was not yet established at the time you went on early retirement you could have approached the ordinary civil courts or the Registrar of Pension Funds for assistance.
- [14] Taking into account all of the above, I am satisfied that no good cause exists for me to extend the 3 year time limit prescribed in section 30I(1) of the Act.
- [15] In the result your complaint cannot succeed.

